

**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)	
)	
Petition for Declaratory Ruling)	
by AirTouch Communications, Inc.)	File No. WTB/POL 97-1
)	
National Wireless Resellers Association)	
v)	File No. WB/ENF-F-97-012
AirTouch Cellular)	

Memorandum Opinion and Order

Adopted: July 25, 2000

Released: July 26, 2000

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. This Memorandum Opinion and Order resolves a Petition for Declaratory Ruling filed by AirTouch Communications, Inc. (AirTouch)¹ and a related formal complaint filed by the National Wireless Resellers Association (NWRA) against AirTouch Cellular.² Both filings address the permissibility of Commercial Mobile Radio Service (CMRS) optional reseller exclusive service agreements.

2. As set forth below, we accept AirTouch's withdrawal of its Petition for Declaratory Ruling and deny NWRA's Formal Complaint as moot on the grounds that the "AirTouch Gold Program," which is the subject of the complaint, has been discontinued.

¹ Petition for Declaratory Ruling of AirTouch Communications, Inc., filed April 18, 1997 (AirTouch Petition). *See* FCC Public Notice, Petition for Declaratory Ruling Filed; Commission Seeks Comment on Petition for Declaratory Ruling Filed by AirTouch Communications, Inc., File No. WTB/POL 97-1, Apr. 29, 1997. In response to the Public Notice, the Commission received nineteen comments and twelve replies. For a list of commenting parties, see Appendix A.

² *National Wireless Resellers Association v. AirTouch*, Formal Complaint, File No. WB/ENF-F-97-012, filed June 2, 1997. NWRA now is a part of the Association of Communications Enterprises, which represents resellers of both wireline and wireless telecommunications services. "AirTouch Cellular" is the brand name under which US West New Vector Group, Inc. markets its cellular products and services.

II. PETITION FOR DECLARATORY ORDER

3. **Background.** In its petition, AirTouch seeks clarification that optional arrangements which permit resellers to obtain discounts in exchange for exclusive service commitments are not a *per se* violation of the Commission's wireless policy and Sections 201 and 202 of the Communications Act.³ Under the type of exclusivity option at issue in the AirTouch Petition, a reseller may elect either to obtain all of its service requirements from a single specified provider, at a lower rate, or to purchase services from a variety of providers, at the specified provider's standard rate. AirTouch concedes that "non-optional exclusivity requirements imposed as a condition of obtaining common carrier services for resale are currently unlawful for cellular carriers." However, AirTouch asserts that the Commission's bar against exclusivity does not apply to optional agreements.⁴

4. CMRS providers supporting AirTouch's petition argue that optional exclusivity agreements, which provide resellers the option of lower prices in return for greater commitments, are not prohibited by either Section 20.12 of the Commission's Rules or Sections 201 and 202 of the Act.⁵ Opposing parties argue that, because optional exclusivity agreements prohibit resellers who have not made such commitments from obtaining a price discount, such agreements effectively preclude competition with either AirTouch or with resellers that receive the exclusivity discount.⁶

5. On April 18, 2000, AirTouch filed a letter with the Commission stating that it was withdrawing its Petition for Declaratory Ruling.⁷ As grounds for this withdrawal, AirTouch argues that the record is stale and withdrawal is more "administratively efficient" than adopting new procedures to refresh the record at this time.⁸ No party opposes the withdrawal of the AirTouch Petition.

6. **Discussion.** We accept AirTouch's withdrawal of its Petition. We agree with AirTouch that the record in this proceeding is stale. Further, given the lack of opposition to AirTouch's request, we also believe it would be administratively inefficient to attempt to refresh the record on these issues at this time. We therefore terminate this proceeding.

³ AirTouch Petition at i.

⁴ *Id.* at 3.

⁵ *See, e.g.*, AirTouch Petition at 5-8; AT&T Comments at 2; BellSouth Comments at 3,7-9; CTIA Comments at 2-5; Primeco Comments at 4-10; Ameritech Reply Comments at 6-7; L.A. Cellular Comments at 3-7; Pronet Comments at 3; AT&T Reply Comments at 3; AT&T Reply Comments at 4-6; BellSouth Reply Comments at 2-3; CTIA Reply Comments at 2-4; GTE Reply Comments at 2-6.

⁶ *See, e.g.*, Dow Lohnes Comments at 3, 5-7; Cellnet Comments at 3-4; OCOM Comments at 3-5; TRA Comments at 3, 5-6, Excellular Comments at 4-5.

⁷ Letter from David A. Gross, AirTouch, to Kris Monteith, Chief, Policy Division, Wireless Telecommunications Bureau, FCC (Apr. 18, 2000).

⁸ *Id.*

III. NWRA'S COMPLAINT

7. **Background.** NWRA's complaint challenges AirTouch Cellular's "Gold Program," an exclusivity arrangement for resellers. Resellers' participation in this "Gold Program" required: maintenance of 55 percent of the reseller's active customer base on the AirTouch network; that at least 75 percent of all activations under the program be "incremental additions" (*i.e.*, users who have not subscribed to AirTouch's services for 90 days prior to activation); maintenance of a current minutes of use commitment; and that the reseller keep accounts with AirTouch current within 60 days of invoice. In return, the "Gold Program" offered resellers benefits above and beyond any benefits accorded to participants in the "Standard Program" for resellers.⁹

8. NWRA requests issuance of an order adjudging the carrier-exclusivity new customer provisions of the "Gold Program" to be unjust and unreasonable restrictions on resale. NWRA also seeks injunctive relief preventing AirTouch from implementing this program.¹⁰ In its Complaint, NWRA contends that both the carrier-exclusivity and new customer restrictions of the "Gold Program" violate the Commission's prohibition on unreasonable restrictions on resale, as well as Sections 201(b) and 202(a) of the Act upon which the resale rule is based. AirTouch raises both procedural and substantive responses in its answer to NWRA's Formal Complaint.

9. On July 15, 1999, AirTouch cancelled the "Gold Program," replacing it with a new bulk offering that does not include an exclusivity requirement. Under its new offering, AirTouch Cellular requires only a minimum use commitment and sets rates based on the volume of minutes used for each cellular number.¹¹

10. **Discussion.** As a preliminary matter, we note that a section 208 formal complaint proceeding is an appropriate proceeding to address whether AirTouch's resale practices violate the Communications Act.¹² Because the "Gold Program" has been terminated, and no amended

⁹ These benefits included: aggregation of minutes of use in the five area markets in the VectorTen Region; fixed price plans for the term of the agreement (one or two years); cooperative funding of \$10 per gross activation per quarter; a 30 percent revenue share on use of AirTouch Cellular One-Bill Long Distance; a 30 percent discount on Electronic Serial Number change charges; and a 25 percent discount on voice mail and certain other services.

¹⁰ NWRA Complaint at 10. The provisions at issue were the requirement that a reseller maintain at least 55 percent of the reseller's active customer base on the AirTouch Cellular network and the requirement that at least 75 percent of the reseller's activations under the program be users who have not subscribed to AirTouch Cellular services for 90 days prior to activation.

¹¹ Letter from David A. Gross, AirTouch, to Peter Wolfe, FCC (Mar. 20, 2000).

¹² *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992). Moreover, it is well established that agencies have broad discretion in determining whether to make policy via rulemakings or adjudications. Indeed the Supreme court stated in *SEC v. Chenery* that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery*, 332 U.S. 194, 203 (1947). See also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (stating that an administrative agency "is not precluded from announcing new principles in an adjudicative proceeding").

complaint has been filed challenging AirTouch's replacement program, NWRA's challenges are now moot. We therefore dismiss NWRA's complaint.

V. PROCEDURAL MATTERS

A. Authority

11. This action is taken pursuant to Sections 1, 4(i), 4(j), 201, 202, 208, 303(r), 309, 332, and 403 of the Communications Act, 47 U.S.C. §§ 1, 4(i), 4(j), 201, 202, 208, 303(r), 309, 332, 403.

B. Further Information

12. For further information regarding this Order, contact Peter Wolfe, Wireless Telecommunications Bureau, Policy Division, at (202) 418-1310 or Frank Lamancusa, Enforcement Bureau, Market Disputes Resolution Division, at (202) 418-0969.

VI. ORDERING CLAUSES

13. **ACCORDINGLY, IT IS ORDERED THAT** the Petition for Declaratory Ruling filed by AirTouch Communications, Inc. requesting clarification that optional arrangements which permit resellers to obtain discounts in exchange for exclusive service commitments are not a *per se* violation of the Commission's wireless policy and Sections 201 and 202 of the Communications Act **IS DISMISSED** and that proceeding is **TERMINATED**.

14. **IT IS FURTHER ORDERED** that the Formal Complaint filed by the National Wireless Resellers Association seeking a determination that the carrier-exclusivity and new-customer provisions in the Gold Program maintained by US West New Vector Group, Inc. as AirTouch Cellular are a *per se* violation of the Commission's wireless policy and Sections 201 and 202 of the Communications Act, **IS DISMISSED AS MOOT**.

James D. Schlichting
Deputy Chief, Wireless Telecommunications Bureau

Appendix A**LIST OF PARTIES****Petition for Declaratory Order:**

AirTouch Communications, Inc. (AirTouch)

Oppositions and Comments to Petition:

Dow, Lohnes, & Albertson (Dow Lohnes)

Ameritech Mobile Communications, Inc. (Ameritech)

AT&T Wireless Services, Inc. (AT&T)

BellSouth Corporation (BellSouth)

Cellnet of Ohio, Inc. (Cellnet)

Cellular Telecommunications Industry Association (CTIA)

Excellular Incorporated: Petition for Declaratory Ruling (Excellular)

GTE Service Corporation (GTE)

ICON Communications Corporation (ICON)

Los Angeles Cellular Telephone Company (LA Cellular)

Marathon Communications, Inc. (Marathon)

National Wireless Resellers Association (NWRA)

MCI Communications Corporation (MCI)

OCOM Corporation (OCOM)

Primeco Personal Communications, L. P. (Primeco)

Pronet Inc. (Pronet)

Select Wireless, Inc. dba Select Cellular (Select)

Telecommunications Resellers Association (TRA)

WorldCom, Inc. (WorldCom)

Reply Comments:

AirTouch and US West New Vector Group, Inc. (AirTouch/US West)

Ameritech

AT&T

Bell Atlantic NYNEX Mobile, Inc. (BANM)

BellSouth

CTIA

GTE

NWRA

OCOM

Paging Network, Inc. (PageNet)

TRA

WorldCom